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Supreme Court of the United States

OCTOBER TERM, 1940

No. 733

NICHOLAS ROERICH,
Petitioner,

against

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

CHARLES B. MCINNIS,
Attorney for Petitioner.

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Of Counsel.

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Nicholas Roerich prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above entitled case on September 3, 1940.

Opinions Below.

The opinion of the Board of Tax Appeals, affirming, in part, the action of the Commissioner, is reported in 38 B. T. A. 567. The opinion of the United States Court of Appeals for the District of Columbia, affirming the decision of the Board of Tax Appeals, is reported in 115 F. (2d) 39. It has been added to this petition as an appendix.

Jurisdiction and Timeliness.

The judgment of the United States Court of Appeals for the District of Columbia was entered on September 3, 1940. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928 and June 7, 1934. On December 3, 1940 an order was made by the Chief Justice extending the time within which a petition for a writ of certiorari in this cause might be filed for a period of sixty days from December 3, 1940.

Questions Presented.

1. Whether the sum of $76,200 deposited in a bank account in the name of the petitioner during the year 1926, and certain interest thereon, was money delivered to petitioner's control as agent or trustee for the purpose of defraying the expenses of an expedition to Asia undertaken by Roerich Museum and other institutions in the City of New York, or was income of the petitioner.

2. Whether $74,271.78 in cash and securities deposited in said bank account in 1927 under similar circumstances, together with certain interest thereon, and profits from dealings in said securities, were received as such agent or trustee, or were income of the petitioner.

3. Whether the failure of the petitioner to file an income tax return for the year 1934 was due to fraud with intent to evade taxes.

Statutes Involved.

Sec. 213(a) (Revenue Act of 1926):

"Sec. 213. For the purposes of this title, except as otherwise provided in section 233—

(a) The term 'gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period."

SEC. 214(a)(1) (Statutory deductions) Revenue Act of 1926:

"Sec. 214. (a) In computing net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of

property to which the taxpayer has not taken or is not taking title or in which he has no equity. * * *"

SEC. 217(c)(3) (Revenue Act of 1926):

"Sec. 217. (a) in the case of a non-resident alien individual or of a citizen entitled to the benefits of section 262, the following items of gross income shall be treated as income from sources within the United States: * * *

"(c) The following items of gross income shall be treated as income from sources without the United States: * * *

"(3) Compensation for labor or personal services performed without the United States: * * *

"(e) Items of gross income, expenses, losses and deductions, other than those specified in subdivisions (a) and (c), shall be allocated or apportioned to sources within or without the United States under rules and regulations prescribed by the Commissioner with the approval of the Secretary. Where items of gross income are separately allocated to sources within the United States, there shall be deducted (for the purpose of computing the net income therefrom) the expenses, losses and other deductions properly apportioned or allocated thereto and a ratable part of other expenses, losses or other deductions which can not definitely be allocated to some item or class of gross income. The remainder, if any, shall be included in full as net income from sources within the United States. In the case of gross income derived from sources partly within and partly without the United States, the net income may first be computed by deducting the expenses, losses or other deductions apportioned or allocated thereto and a ratable part of any expenses, losses or other deductions which can not definitely be allocated to some items or class of gross income; and the

portion of such net income attributable to sources within the United States may be determined by processes or formulas of general apportionment prescribed by the Commissioner with the approval of the Secretary. Gains, profits and income from (1) transportation or other services rendered partly within and partly without the United States, or (2) from the sale of personal property produced (in whole or in part) by the taxpayer within and sold without the United States, or produced (in whole or in part) by the taxpayer without and sold within the United States, shall be treated as derived partly from sources within and partly from sources without the United States. Gains, profits and income derived from the purchase of personal property within and its sale without the United States or from the purchase of personal property without and its sale within the United States, shall be treated as derived entirely from sources within the country in which sold, except that gains, profits and income derived from the purchase of personal property within the United States and its sale within a possession of the United States or from the purchase of personal property within a possession of the United States and its sale within the United States shall be treated as derived partly from sources within and partly from sources without the United States."

* * * * *

(g)(1) Except as provided in paragraph (2) a nonresident alien individual or a citizen entitled to the benefits of section 262 shall receive the benefit of the deductions and credits allowed in this title only by filing or causing to be filed with the collector a true and accurate return of his total income received from all sources in the United States, in the manner prescribed in this title; including therein all the information which the Commissioner may deem necessary for the calculation of such deductions and credits.

ART. 328, Reg. 69:

"*Art. 328, Reg. 69. Income derived from sources partly within and partly without the United States.*—Items of gross income not allocated by articles 317-324 or 327 to sources within or without the United States shall (unless unmistakably from a source within or a source without the United States) be treated as derived from sources partly within and partly without the United States, according to the following rules and cases:

"*Manufacturers and producers.*—Gross income derived from the sale of personal property produced (in whole or in part) by the taxpayer within and sold without the United States, or produced in whole or in part by the taxpayer without and sold within the United States shall be treated as derived partly from sources within and partly from sources without the United States, under one of the cases named below. As used herein, the word 'produced' includes created, fabricated, manufactured, extracted, processed, cured, or aged.

"Case 1: Where the manufacturer or producer regularly sells part of his output to wholly independent distributors or other selling concerns in such a way as to establish fairly an independent factory or production price—or shows to the satisfaction of the Commissioner that such an independent factory or production price has been otherwise established—unaffected by considerations of tax liability, and the selling or distributing branch or department of the business is located in a different country than that in which the factory is located or the production carried on, the net income attributable to sources within the United States shall be computed by an accounting which treats the products as sold by the factory or productive department of the business to the distributing or selling department at the independent factory price so estab-

lished. In all such cases the basis of the accounting shall be fully explained in a statement attached to the return.

"Case 2: Where an independent factory or production price has not been established as provided under case 1, the net income shall first be computed by deducting from the gross income derived from sources partly within and partly without the United States the expenses, losses, or other deductions properly apportioned or allocated thereto and a ratable part of any expenses, losses, or other deductions which can not definitely be allocated to some item or class of gross income. Of the amount of net income so determined, one-half shall be apportioned in accordance with the value of the taxpayer's property within and without the United States, the portion attributable to sources within the United States being determined by multiplying such one-half by a fraction the numerator of which consists of the value of the taxpayer's property within the United States and the denominator of which consists of the value of the taxpayer's property both within and without the United States. The remaining one-half of such net income shall be apportioned in accordance with the gross sales of the taxpayer within and without the United States, the portion attributable to sources within the United States being determined by multiplying such one-half by a fraction the numerator of which consists of the taxpayer's gross sales for the taxable year or period within the United States, and the denominator of which consists of the taxpayer's gross sales for the taxable year or period both within and without the United States. 'Gross sales within the United States' means the aggregate amount of all sales made during the taxable year which were principally secured, negotiated or effected by employees, agents, offices, or branches of the taxpayer's business resident or located in the United States.

"The term 'property' as used in this article includes only the property held or used to produce income which is derived from sources partly within and partly without the United States (excluding all property held or used to produce income which is allocated or apportioned under other articles or paragraphs of these regulations). Such property should be taken at its actual value, which in the case of property valued or appraised for purposes of inventory, depreciation, depletion, or other purposes of the Revenue Act of 1924 shall be the highest amount at which so valued or appraised, and which in other cases shall be deemed to be its book value in the absence of affirmative evidence showing such value to be greater or less than the actual value. The average value during the taxable year or period shall be employed. The average value of property as above prescribed at the beginning and end of the taxable year or period ordinarily may be used, unless by reason of material changes during the taxable year or period such average does not fairly represent the average for such year or period, in which event the average shall be determined upon a monthly or daily basis. Bills and accounts receivable shall (unless satisfactory reason for a different treatment is shown) be assigned or allocated to the United States when the debtor resides in the United States, unless the taxpayer has no office, branch or agent in the United States.

"Case 3: Application for permission to base the return upon the taxpayer's books of account will be considered by the Commissioner in the case of any taxpayer who, in good faith and unaffected by considerations of tax liability, regularly employs in his books of account a detailed allocation of receipts and expenditures which reflects more clearly than the processes or formulas prescribed under cases 1 and 2, the income derived from sources within the United States."

Statement of Case.

The petitioner is an artist, scientist and writer (R. 37, 65). During the years 1926 and 1927 (and for some time both before and after those years), he was the leader of an expedition through central Asia, the aims and purposes of which were scientific and artistic (R. 65). This expedition was undertaken by petitioner at the request of two educational institutions, Master Institute of United Arts, Inc., and Roerich Museum (R. 65), and a third institution associated with them, a business corporation known as Corona Mundi International Art Center (R. 38); and with the assurance of the financial backing of these institutions (R. 66, Findings of Fact, R. 39). The arrangement between the petitioner and the directors of the three institutions was that in return for the sponsoring of the expedition they were to receive the fruits of the expedition, including the paintings which were to be painted by the petitioner while on the expedition (R. 66). It was also agreed between the petitioner and the institutions that the paintings were to receive a "special valuation" and that the total expenses would not exceed the total of such valuation of the paintings (R. 67, Findings of Fact R. 39). Manifestly the only practical effect which this arrangement could have was to provide that the paintings should receive an artificial valuation related to the amount of the expenses.

One Louis L. Horch was president of all three institutions and the actual owner of all of the stock of Roerich Museum (Findings of Fact R. 39). On May 1, 1925, Horch wrote to the petitioner that he had "subscribed" $500,000 for the expedition (Findings of Fact R. 39). Horch also held a power of attorney from the petitioner, pursuant to which he opened a bank account in petitioner's name in the Bankers Trust Company in New York City (Findings of

Fact R. 40). The expenses of the expedition were paid from this account (Findings of Fact R. 40).

The controversy with respect to the years 1926 and 1927 is upon the following questions:

> (a) Whether the sum of $76,200 deposited by Horch in this bank account during the year 1926, and certain interest thereon, was money delivered to petitioner's control as agent or trustee for the purpose of defraying the expenses of the expedition, or was income of the petitioner;
>
> (b) Whether $74,271.78 in cash and securities deposited in said bank in 1927 under similar circumstances, together with certain interest thereon, and profits from dealings in the securities, was received as such agent or trustee, or was income of the petitioner.

The finding of the Board that these payments were income turns upon the testimony of Horch that in 1926 and 1927 he paid these sums into the account as the purchase price of paintings which he bought from the petitioner (R. 82, See opinion R. 49). During these years the petitioner was in remote parts of Asia and the only communication between petitioner and Horch in any way relating to the paintings or the alleged sale, were two cables from Horch to petitioner, dated respectively October 19, 1926 and November 27, 1927, to neither of which petitioner replied, from which we quote the language which the Board has held to be corroborative of Horch's testimony.

On October 19, 1926, Horch sent the petitioner a cable containing the words

> "Loan exhibition made permanent by Odomar" (R. 90, 91, Ex. EE, R. 216).

On November 27, 1927, Horch sent to petitioner a cable containing the words

"all remaining pictures have been made permanent by etienne and odomar" (R. 88, Ex. AA, R. 211).

It was undisputed that "odomar" was a symbol or code word for Horch and "etienne" for Horch's wife (R. 88). The references to the "loan exhibition" and to making the remaining pictures "permanent," are explained as follows:

A catalogue issued by the Roerich Museum in 1926 lists five series of paintings consisting of 152 units painted in 1924 and 1925 with the annotation "(L. E.)," meaning "loan exhibition" (Findings of Fact, R. 41). In a catalogue issued in 1929, the five series of paintings are not followed by "(L. E.)" (Findings of Fact, R. 42), and Horch's explanation of the change is that the paintings had in the meantime been purchased by him and his wife and given to the Museum. The opinion below shows that the Board took this to be evidence not merely that the ownership of the paintings had changed between 1926 to 1929, but that this change of ownership had been effected in the manner explained by Horch. In order to determine whether there was any real basis for the latter inference, it is necessary to review the relationships between Roerich and the institutions from the time when the expedition was first undertaken.

The fundamental purpose of Horch was that all of the petitioner's paintings should remain in perpetuity the property of the Museum. In a letter in evidence he wrote:

> "From the moment almost when I met Prof. Roerich I had only one wish, namely, to gather all paintings of Prof. Roerich in one place, so that no one should ever get them, to keep these treasures for humanity at all times! And what did I want to do, sell a few of them to help some temporary condition" (R. 111).

It was nevertheless contemplated that it might be necessary to resort to sale of the pictures to outsiders in order to meet the expenses of the expedition. This is shown by a letter written by Roerich to Corona Mundi on July 15, 1925 (R. 42) from which we quote as follows:

> "All paintings of 1925 sent for the Loan Exhibition in Museum have the price list as in 1924, that is: 'Series of Banners of the East' at $5,000.—; for the Museum one third of this price. On thick cardboards at $3,000.—; for the Museum one third of the price. 'Benares' or 'Crossroads of Buddha & Christ' at $5,000.—but for Ch. Crane an exception one or the other. Of course I give the right to 'Corona Mundi' slightly to change the prices; depending of necessity. The frames are included into the prices of the paintings as well as expenses on transportation."

At the time this letter was written the arrangement under which the institutions were entitled to the fruits of the expedition in return for paying the expenses was in effect, but it was nevertheless realized that the Museum's possession of the paintings might be only temporary if donations were insufficient to pay the expenses of the expedition. In these circumstances, Roerich (who was an officer of Corona Mundi as well as of the other institutions) (R. 65) devised and Horch appears to have approved, the plan set forth in the letter whereby the paintings were offered by the Museum for sale to anyone who would donate the picture back to the Museum, at a price one-third of that which would be charged to one who intended to remove it. In order to make a distinction between paintings which had by such donation been put on permanent exhibition in the Museum, and those which were still subject to the contingency of sale for removal, the latter class was designated as the "loan exhibition". The "loan" involved, however,

was not a loan by Roerich to the institutions, for the institutions already owned the pictures; but a loan in the sense that the Museum, as distinguished from the other institutions, which were the original sponsors of the expedition, had only a temporary and conditional custody.

Those who paid one-third of the list price for the paintings and left them on the walls of the Museum, may have thought of the transaction as a purchase from the institutions and a donation to the Museum. It would be more realistic to regard it simply as a contribution. But in any event there is nothing in the evidence to support any finding that a transaction of this nature was intended to be a sale by *Roerich* and a subsequent donation by *Roerich* of the purchase price to the Museum. Any such interpretation would be utterly inconsistent with the admitted facts (1) that the institutions and not Roerich were financing the expedition (R. 39, 153); and (2) that Roerich accounted to the institutions for the money received from them. (This was testified to by Roerich (R. 75) and not disputed by Horch, who was the controlling officer of the institutions.) It will be contended, furthermore, that such an interpretation would be a legal impossibility, in view of the fiduciary relations existing between Horch and Roerich; but as that involves questions of law, its further discussion will be reserved for the argument.

On August 29, 1928, while in Asia, the petitioner signed a letter prepared by Horch, the effect of which was to "confirm" the sale of all of his paintings during the years 1924 and 1928 to Horch. The petitioner testified concerning this letter that he signed it because he received a message from Horch through a Miss Grant, who brought the letter to him, to the effect that the letter "was a pure formality, and that it did not affect or change in any way the original arrangements regarding the expedition and

its results" (R. 72, 73). In this testimony the petitioner is corroborated by Miss Grant (R. 128), and Horch did not contradict them. This explanation of the letter therefore stands undisputed; and the Board has made an express finding that "Miss Grant stated to petitioner that Horch wished this letter merely for technical reasons" (R. 45).

The paintings which were the subject of the alleged sale are a group listed in catalogues of the Roerich Museum (Exhibits H and I not printed, see stipulation, R. 227) as Nos. 461 to 734, inclusive, and another group not definitely identified by Horch (R. 80, 81). According to Horch's testimony "every one of them was always on the walls of the Museum" (R. 125). He also testified:

> "I did not convey to the Museum these paintings I bought, but I considered them to belong to the Museum" (R. 102, 103).

and further:

> "There is no instrument of title or transfer of title from me to Roerich Museum of paintings numbered 461 to 613 in respondent's Exhibit I. There never was one" (R. 103).

Except for the letter of August 29, 1928 (Ex. Y, R. p. 210), there is nothing in the record to suggest that Horch ever referred to the transactions in question as a sale to him, or even thought of them in that way, until the fall of the year 1935 (R. 77), when he had a break with petitioner, characterized on Horch's part by the utmost bitterness of feeling. (See Ex. 13, R. 150, 151; Ex. W, R. 205, referred to in the Statement of Evidence as Ex. U [R. 86].) Hard upon the outbreak of this hostility we note an interview between Horch and a local Revenue Agent in connection with this case (R. 96, 97), and this proceeding was begun.

It has been found by the Board that there was a close relationship between the payments made into the bank account by Horch and petitioner's applications for funds to meet the expenses of the expedition. We quote from the Finding of Fact (R. 42):

> "Petitioner's letters to his associates often contained requests for funds, which Horch usually furnished, and when the Lichtmanns returned from their visit to the expedition in 1926 they advised the trustees of the institutions that petitioner was in need of $75,000. At a meeting of the trustees, Horch offered to advance the amount." (See also testimony of witness M. M. Lichtmann, R. 131.)

The Lichtmanns returned from a visit to the expedition "in the summer or early fall of 1926" (testimony of Horch, R. 102) and the first deposit of $73,300 was made on October 1, 1926. In 1927, similarly, Mr. Lichtmann "conveyed" to Mr. Horch and the Trustees "the need of the expedition for further money" (R. 131); in this connection Horch stated that he would make contributions to the expedition (R. 128).

The total amount expended for the purpose of the expedition for a period of six years was approximately $250,000 (R. 68). All of the money deposited in the bank account was used for the purposes of the expedition (R. 69, 70).

Early in the hearing before the Board Horch was asked on cross-examination to allocate the total sum alleged to have been paid into the account to particular paintings. At R. 103, after some confused testimony on Horch's part on this subject, counsel for the Commissioner "protested that the witness could not match up the figures unless he was allowed to do so without interruption". The Member then made this comment:

"He does not seem to be able to, if I have to answer your question."

Following this comment at R. 103, 104 and 105, there was further unsatisfactory testimony on this point, concluding with the following colloquy (R. 105):

> The Witness: "* * * If you take the large pictures and work out mathematically, and take the smaller and the others, you can get to a price of some paintings there.
>
> The Member: Did you ever try to do that?
>
> The Witness: I think I might try."

The effort was resumed toward the conclusion of the hearings and Horch testified at length at R. 118-119, concluding with the apparent admission by the witness that he was unable to connect the price paid with any prices fixed by Roerich for individual pictures, and the assertion that "Roerich, not being able to sell his paintings, made this whole lot $75,000" (R. 119). There is nothing in the evidence, except this assertion, to the effect that Roerich ever made such a price for the "whole lot".

Horch testified that at the time of the deposit of $73,300 made by him in 1927, other contributions of the same nature were made by one S. N. Newberger, Miss F. R. Grant and M. M. Lichtmann and S. Lichtmann, the respective amounts being $1,000, $200 and $500 (R. 101). Horch testified: "These persons bought pictures too" (R. 101). Miss Grant, on the contrary, testified that the $200 paid by her was not a purchase but "a contribution volunteered for the expedition" (R. 127). Mr. Lichtmann gave testimony to the same effect (R. 131). Newberger, Horch's brother-in-law (R. 93), was not called as a witness. On the first sheet of Exhibit G (R. 174), in Horch's own handwriting, the annotation appears opposite the record of the Newberger,

Grant and Lichtmann contributions "toward making permanent loan exhibition".

In 1927 the whole expedition was held captive in Tibet for several months, and the institutions sought to recover damages from the Tibetan Government on this account. On July 6, 1928, the Roerich Museum, by Louis L. Horch, president, wrote a letter evidently intended to be exhibited to Tibetan officials stating that the detention of the expedition had resulted "in a loss of $250,000 to the American art institutions, under whose auspices the Roerich American Expedition has pursued its work for art and science" (Ex. 17, R. 158); and on July 14, 1928, Horch and Maurice Lichtmann, describing themselves "respectively President and Vice-President of the Roerich Museum, Master Institute of United Arts, Corona Mundi, International Art Center, New Syndicate, International Information Agency" made a sworn statement to the effect that as a result of the forcible detention of the expedition by Tibetan officials losses of $250,000 were sustained by these institutions (Ex. 16, R. 155).

Reference was made in the evidence to the purchase by Roerich Museum in November 1929 of a new series of paintings by the petitioner for $200,000—not in cash but with the understanding that 4% a year on this sum was to be paid to the petitioner. Horch himself testified that this had "nothing to do with any paintings which I had purchased," and we refer to it only to point out that concededly it has no bearing upon the transactions of 1926 and 1927 with which the Court is concerned. This applies also to the agreement made by the petitioner on May 1, 1923 (Ex. X, R. 209) giving to Corona Mundi the exclusive right to purchase all of his paintings, books and other productions during the period of his life (see Findings

of Fact, R. 38). In view of the undisputed fact that the institutions were entitled to the 1926 and 1927 paintings in return for paying the expenses of the expedition, and that the Museum actually received them, it is clear that *pro tanto* this agreement was in fact superseded by the later agreement. Not only is it the undisputed testimony of Roerich that the agreement with Corona Mundi became operative only after the expedition was over, in 1929 (R. 73); but even if it were thought of as remaining in effect during the period of the expedition, so that the institutions became in form the purchaser of the paintings, the provision that the so-called purchase price should be measured by the expenses of the expedition makes the effect of the agreement simply that the institutions should have the paintings in exchange for the expenses (see Findings of Fact as to the measurement of expedition expenses by the "valuation" of the paintings, R. 39). It is to be noted that the Roerich Museum was not incorporated until September 1923, several months after the agreement with Corona Mundi was made (R. 38); and its becoming a party to the agreement naturally occasioned some revision of the earlier arrangements.

There is also a reference in the evidence to an instrument dated September, 1928 purporting to transfer all of the paintings to a corporation called Nicholas Roerich Painting and Art Collections, Inc. (R. 54); but not only is this subsequent to the transactions involved in the case, but there is not the slightest evidence (except sheer hearsay) that the petitioner had anything to do with the alleged instrument or that it ever became or was intended to become operative.

One other item of evidence calls for brief comment, since it was relied upon by the Board as evidence that certain of the securities deposited by Horch with the

Bankers Trust Company were treated by Roerich as his individual property, thus negativing the evidence, otherwise uncontradicted, that all of the money so deposited was used for the purposes of the expedition (R. 46). It appears that in Roerich's income tax return for the year 1929 he reported a loss on three bonds of the General Motors Acceptance Company, having a cost price of $2,906.25 (Ex. V, R. 203). The Board found that this price was "proportionately equal to the price at which Horch bought '5,000 General Motors Acceptance Corp. 5's' for the account with funds from petitioner's bank account in November 1927" (Findings of Fact, R. 46). We have searched the record in vain for any evidence whatever of the cost of these bonds in 1927; but even if such evidence existed it would be an obvious *non sequitur* to find that because the three bonds had the same cost price they were three of the five bonds which Horch deposited in 1927.

One explanation of the obscurity and confusion in which Horch became involved when he testified about these transactions may be found in his statement, made on the witness stand in a suit in New York concerning his dealings with Roerich, to the effect that he changed his mind from time to time as to the legal form of the transactions. He evidently thought that it was within his power to do this, even retroactively, because he was in absolute control of the institutions, and in addition was Roerich's agent. We quote his extraordinary testimony from the record at page 108:

> "At this point, counsel for petitioner read to the witness his testimony in certain litigation entitled '*Grant* v. *Newberger*,' as follows:— 'Did you include the half million dollars that you gave to the expedition? Answer: Half a million to the expedition? Question: Yes. Answer: Well, the expedition was

handled in this way at that time: I had many ideas how to handle that particular thing. Until I came to the final conclusion I wrote a good deal about it and made changes, and everything else. As far as I know, the expedition was called many things. It was called a purchase of works of art abroad, for instance. When I was abroad I bought a lot of works of art, $150,000 worth, and so forth.'

"The witness continuing:

That half million never went into effect.

The Member: But you did answer that question in that way at that trial, did you?

"The Witness: I did, sir.

"Counsel for petitioner then read to the witness the following further testimony given by him in said litigation:—'Question: Was that just another way of labeling what should have been contributions to the exhibition? Answer: Yes, but I made many changes there when I came to figure back and forth.' "

1934 Tax

The Commissioner has assessed against petitioner a tax on a net income of $6,069 (R. 16). The petitioner does not contest this assessment, except that he alleges that in 1934, $1,300 was contributed to Roerich Museum and Master Institute of Arts, Inc., and $1,470 was contributed to Urusvati Himalayan Research Institute at Naggar, India. The Board has found that these deductions are not allowable because no proper return for the year 1934 was filed and also "on another ground" not specified. The Commissioner disallowed these deductions and assessed a tax of $314.21, to which was added a 25% penalty for failure to file a return, amounting to $78.55, and a 50% fraud penalty amounting to $157.11. As no question will be raised by the petitioner with respect to this tax, except the correctness of the fraud

penalty, only the evidence bearing upon that phase of the matter will be set forth in this statement.

The petitioner testified that Horch had attended to the filing of his income tax return from 1922 to 1935, except during the period from 1924 to 1928 inclusive (during which Roerich was engaged in the expedition to Asia and there was no occasion for filing returns) and 1933 (as to which year there is nothing to indicate that a return had to be filed) (R. 71). The petitioner further testified that he supposed in 1935 that his "arrangement with Mr. Horch as to filing income tax returns was still in existence" (R. 72); that it was "understood that said arrangement was to remain in effect while my power of attorney with Mr. Horch lasted" (R. 72); that he received an inquiry in 1935 from Mr. Horch with respect to the 1934 income tax return, to which he replied that there was no income other than what he (Horch) already knew (R. 75). Horch testified that he filed income tax returns for Roerich when he was instructed to do so (R. 86). He filed a tentative return for 1934 (Ex. V, R. 207). Before the Commissioner there was put in evidence a letter from Horch to petitioner, dated August 7, 1935 (Ex. W, R. 205), containing the following paragraph:

> "To my Letter in which I requested Information in regard to the Income which you earned in 1934 no Reply has been received by me. This Information was needed for your Income Tax Return for the American Government. You know how strict the American Government is, but this of course is entirely your affair."

There is nothing in the evidence to show that the petitioner's answer to Mr. Horch referred to in petitioner's testimony was not sent in answer to this letter Horch was unable to produce any evidence of a prior request for

information, although the respondent subpoenaed all of Horch's correspondence "pertaining to this matter" (R. 86, 87). If Horch's testimony at R. 86, 87 in this connection is carefully analyzed, it will be found to be quite consistent with the hypothesis that the petitioner answered the letter with the statement that there was no income other than what Horch already knew of. If that was the case, the evidence showed no fraud but an innocent misunderstanding. The fact that Horch filed a tentative return and wrote Roerich corroborates Roerich's testimony that he did not intentionally fail to file a return, but relied on Horch to take care of it. The issue is narrowed to whether Roerich withheld necessary data from his agent, with the intention of preventing the filing of a proper return.

The undisputed evidence proves that Horch's excuse that he lacked the necessary information to prepare the return is a dishonest pretext. Horch testified (R. 85) that he personally deposited in Roerich's bank account in 1934 the proceeds of sales of paintings amounting to $6,289, and that he knew of additional sales to a Mrs. Campbell and a Mr. Holt, amounting to $2,350; also that he kept a record of sales of Roerich's paintings in 1934, in which record he identified sales of which the purchase price totalled $6,289 (R. 91). The only source of taxable income which Roerich could have been believed by Horch to have were the proceeds of sales of his paintings in this country and interest or dividends on securities of which Horch himself had the custody; *i. e.*, everything indicates that Horch as Roerich's trusted agent did have complete information as to all Roerich's taxable income.

Specification of Errors to be Urged.

The United States Court of Appeals for the District of Columbia erred:

1. In affirming the holding of the Board of Tax Appeals that the deposit of $76,200 made in the Bankers Trust Company in petitioner's name in the year 1926, with interest thereon, constituted income of the petitioner.

2. In affirming the holding of the Board of Tax Appeals that said bank deposit of $76,200 constituted the purchase price of property sold by the petitioner during the year 1926.

3. In affirming the holding of the Board of Tax Appeals that said bank deposit of $76.200 and said interest, was received by petitioner for his personal benefit and not as an agent or trustee.

4. In affirming the holding of the Board of Tax Appeals that the deposit of $74,271.78 made in said bank account in petitioner's name in the year 1927, together with interest thereon, and the interest and profits on securities purchased out of said bank account, constituted income of the petitioner.

5. In affirming the holding of the Board of Tax Appeals that the said bank deposit of $74,271.78 constituted the purchase price of property sold by the petitioner during the year 1927.

6. In affirming the holding of the Board of Tax Appeals that the said bank deposit of $74,271.78 and said interest and profits, was received by petitioner for his personal benefit and not as agent or trustee.

7. In affirming the holding of the Board of Tax Appeals that the deficiency for 1934 was due to fraud with intent to evade taxes.

Dated, New York, N. Y., January 30, 1941.

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